

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN, ELVIRA)
BUMPUS, RONALD BIENDSEIL, LESLIE W.)
DAVIS, III, BRETT ECKSTEIN, GLORIA)
ROGERS, RICHARD KRESBACH, ROCHELLE)
MOORE, AMY RISSEEUEW, JUDY ROBSON, JEANNE)
SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS)
THYSSEN, CINDY BARBERA, RON BOONE, VERA)
BOONE, EVANJELINA CLEERMAN, SHEILA)
COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON,) Case No. 11-CV-562
RICHARD LANGE, and GLADYS MANZANET,) JPS-DPW-RMD
)
Plaintiffs,) Milwaukee, Wisconsin
)
TAMMY BALDWIN, GWENDOLYNNE MOORE and) February 21, 2012
RONALD KIND,) 8:30 a.m.
)
Intervenor-Plaintiffs,) **VOLUME I**
) **A.M. SESSION**
v.)
)
Members of the Wisconsin Government)
Accountability Board, each only in his)
official capacity: MICHAEL BRENNAN,)
DAVID DEININGER, GERALD NICHOL, THOMAS)
CANE, THOMAS BARLAND, and TIMOTHY VOCKE,)
and KEVIN KENNEDY, Director and General)
Counsel for the Wisconsin Government)
Accountability Board,)
)
Defendants,)
)
(caption continued on next page))

TRANSCRIPT OF COURT TRIAL

BEFORE DIANE WOOD, CIRCUIT JUDGE, ROBERT DOW, JR., DISTRICT
JUDGE, and J. P. STADTMUELLER, DISTRICT JUDGE

Contract Reporters: Halma-Jilek Reporting 414-271-4466

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F. JAMES SENSENBRENNER, JR., THOMAS E.)
 PETRI, PAUL D. RYAN, JR., REID J.)
 RIBBLE, and SEAN P. DUFFY,)

Intervenor-Defendants.)

VOCES DE LA FRONTERA, INC., RAMIRO)
 VARA, OLGA VARA, JOSE PEREZ, and)
 ERICA RAMIREZ,)

Plaintiffs,)

v.) Case No. 11-CV-1011
) JPS-DPW-RMD

Members of the Wisconsin Government)
 Accountability Board, each only in his)
 official capacity: MICHAEL BRENNAN,)
 DAVID DEININGER, GERALD NICHOL, THOMAS)
 CANE, THOMAS BARLAND, and TIMOTHY)
 VOCKE, and KEVIN KENNEDY, Director and)
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Defendants.)

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P R O C E E D I N G S

THE BAILIFF: Hear Ye, Hear Ye, Hear Ye, the United States District Court for the Eastern District of Wisconsin is now open, the Honorable Judges J. P. Stadtmueller, District Judge, Eastern District of Wisconsin, Diane P. Wood, Circuit Court Judge, United States Court of Appeals for the Seventh Circuit, and Robert M. Dow, Jr., District Judge, Northern District of Illinois, presiding.

All persons having business before this Honorable Court are admonished to draw near and give their attention for this special three-judge court convened pursuant to Title 28, United States Code, Section 2284 is now in session.

God save the United States and this Honorable Court. Please be seated and come to order.

THE CLERK: The court calls Alvin Baldus, et al, versus Michael Brennan, et al, Case No. 11-CV-562 for a court trial. May I have the appearances, beginning with the plaintiffs.

MR. POLAND: Good morning. Doug Poland, Dustin Brown and Wendy Arends appearing on behalf of the Baldus Plaintiffs.

MR. EARLE: Good morning, Your Honors. Peter Earle and Jackie Boynton appearing on behalf of Voces de la Frontera, et al, Consolidated Plaintiffs.

MR. HASSETT: Good morning, Your Honors. Scott Hassett and Jim Olson appearing on behalf of the Intervening

1 Plaintiffs, the Congressional Representatives and the
2 Democratic Caucus.

3 MS. LAZAR: Good morning, your Honor. Assistant
4 Attorney General Maria Lazar, also appearing with counsel from
5 Reinhart, Dan Kelly, Patrick Hodan and Colleen Fielkow. We
6 represent the Defendants, the Government Accountability Board
7 and its Director and General Counsel.

8 MR. SHRINER: Thomas L. Shriner, Jr., and Kellen C.
9 Kasper of Foley & Lardner for the Intervening Defendants.

10 JUDGE STADTMUELLER: Thank you. Are there any other
11 appearances that wish to be noted this morning?

12 (No response.)

13 JUDGE STADTMUELLER: Is Mr. Daugherty or Mr. Troupis
14 in the courtroom?

15 (No response.)

16 JUDGE STADTMUELLER: Does anyone know if they are in
17 the building?

18 MR. SHRINER: There was a long line at the door, Your
19 Honor. I don't know, though.

20 MR. EARLE: Your Honor, may I?

21 JUDGE STADTMUELLER: Certainly.

22 MR. EARLE: I spoke with Mr. Daugherty last night
23 before this was -- the motion was filed, and I was informed
24 that it was going to be filed. It was my understanding that he
25 was going to be here in order to deal with this.

1 JUDGE STADTMUELLER: All right. Would you like to
2 step out in the hall, Mr. Earle, and see if you can reach
3 either Mr. Daugherty or Mr. Troupis on the phone, because I
4 would like them to be in the courtroom.

5 MR. EARLE: Certainly, Your Honor.

6 (A brief recess was taken.)

7 MR. EARLE: Your Honor, I called the Whyte
8 Hirschboeck firm and was informed that he's in that building.
9 They are trying to get ahold of him.

10 JUDGE STADTMUELLER: All right. So as to not keep
11 anybody in suspense while we await Mr. Daugherty and
12 Mr. Troupis' arrival, let me make some preliminary comments
13 that I believe are shared by my two colleagues, as well.
14 Obviously, this case has been very, very focused in the last 10
15 to 15 days, which has resulted in an incredible number of
16 filings with the court. At last count, in just 10 days the
17 court has now received over 2,400 pages in filings, many of
18 which came after the close of business last evening. I
19 appreciate the fact that each of you, in zealously representing
20 the interests of your respective clients, have endeavored to
21 comply with each of the court's directives with respect to
22 bringing this case to trial and having it in a posture that it
23 can be adjudicated in a timely way, but, obviously, along that
24 path there have been a number of matters that have sort of
25 become distractions to the court issues in the case.

1 Unfortunately, we are at another one of those
2 junctures with regard to the matter addressed in Docket No.
3 179, which is a motion that was filed last evening for yet
4 another clarification with respect to the matter of the
5 attorney-client privilege and how it may impact any testimony
6 to be given by the individuals subpoenaed, namely, Mr. James
7 Troupis, and it is in that connection that the court wishes to
8 have Mr. Troupis and his counsel present so that the court can
9 address that not only with counsel who are present this
10 morning, but Mr. Troupis and his counsel, as well. So pending
11 their arrival, we will simply stand in recess for a few
12 minutes. The court stands in recess.

13 THE BAILIFF: All rise.

14 (A recess was taken.)

15 THE BAILIFF: All rise. Court is now in session.
16 Please be seated and come to order.

17 JUDGE STADTMUELLER: Let the record reflect that we
18 have reconvened in the matter of Baldus, et al, versus Brennan,
19 et al. The record should also reflect that Mr. Troupis and his
20 counsel have now appeared, and if you would be so kind, please
21 note your appearances for the record.

22 MR. DAUGHERTY: Yes, Your Honor. Don Daughtery and
23 John Tuffnell of Whyte Hirschboeck Dudek on behalf on James
24 Troupis.

25 JUDGE STADTMUELLER: Good morning to you, and, again,

1 good morning to all counsel and your client representatives who
2 are present this morning. For purposes of our dialogue, I
3 earlier noted that in the last 10 days the court has received
4 in excess of 2,400 pages in filings, many of which have come in
5 the last 8 or 9 hours, simply leaving the court, at least as of
6 this moment, without the benefit of some of the responses,
7 particularly to Proposed Findings of Fact and Conclusions of
8 Law.

9 But more significantly, last evening Mr. Daughtery
10 and Mr. Tuffnell, on behalf of Mr. Troupis, filed yet another
11 motion for clarification of this issue of the attorney-client
12 privilege as it relates to the representation, whether it be
13 legal or strategic or political, of the members of the
14 Wisconsin Legislature.

15 The motion did not come with a brief and, obviously,
16 we haven't had an opportunity to even invite a response from
17 the proponents of Mr. Troupis' testimony. Against that
18 backdrop, I think it important that the following record be
19 made with the thought that in the end ultimately, including the
20 recent Supreme Court case in Perry versus Perez, that this
21 whole issue of redistricting ought, in the first instance, be
22 entrusted to the Legislature.

23 It is quite clear to both I and my colleagues that
24 there are some troubling issues in this case among the myriad
25 of issues that have been addressed both in pleadings, motions

1 for judgment on the pleadings, motions for summary judgment and
2 expert testimony. As a court we felt it in everyone's interest
3 to provide counsel with a little bit of backdrop in terms of
4 the issues that are foremost in the court's mind, and distilled
5 to their root they really lie in the umbrella of Count 1 of the
6 Amended Complaint, along with Counts 3, 5 and 7.

7 With respect to Count 3, whether it will carry the
8 day or not is a totally different question, but, nonetheless,
9 it is among the issues that the court believes that require
10 some sharper focus, and that is the disenfranchisement, whether
11 necessary or unnecessary, and that really is the question of
12 some 300,000 voters, but even more significantly is the
13 question of the racial makeup with respect to the districts
14 embodying the African American population, and even more
15 significant is the impact of Act 43 with respect to the
16 implications for the Latino community.

17 So here is where we are as of Tuesday morning,
18 February 21st. With respect to the matter of clarification of
19 Mr. Troupis' status as counsel for the Legislature and what
20 ought, if anything, be protected by the attorney-client
21 privilege, I'm going to direct that his counsel submit a
22 Memorandum of Law addressing both the facts and the legal
23 implications not later than 4:00 o'clock this afternoon. With
24 respect to the matter of a response from any other counsel,
25 that response has to be filed not later than 8:00 o'clock

1 tomorrow morning.

2 In the interim, against the backdrop of the comments
3 that I have just made and drawing upon the oft quoted phrase of
4 one of my mentors, John Reynolds, it is never too late to
5 engage in meaningful dialogue between counsel and their clients
6 with regard to how best to proceed with regard to achieving
7 that which every citizen, without regard to party affiliation,
8 without regard to politics, ought to achieve, and that is a
9 fair, just and meaningful redistricting plan.

10 So what I'm going to suggest is that counsel meet and
11 confer and notify the court by the end of today, and
12 specifically 5:30, whether there is any opportunity available
13 to revisit the entirety of the subject matter that the court
14 has raised in terms of its concerns directly with the parties
15 involved, be they the leadership in the Legislature, the
16 governor, the attorney general and other interested parties,
17 and advise the court as to whether or not there is an
18 opportunity to revisit this legislation in the forum that it
19 should be addressed, namely, the Wisconsin Legislature.

20 If that avenue is not available for whatever reason,
21 we will commence with the trial starting tomorrow morning at
22 8:30. Likewise, if there is a good faith effort to achieve
23 legislatively that which everyone would like to see achieved,
24 we will extend the beginning of this trial either to the week
25 of March 12th or March 19th, which means essentially if the

1 Legislature would like to revisit this subject, they, in
2 effect, will have about four weeks to do so, if the trial
3 resumes on Monday, March 19th.

4 I appreciate that's an awful lot on the opening day
5 of trial for a lot of folks to digest, but I think in the end,
6 with all of the hard effort that has gone into this case thus
7 far, together with the numerous filings, the experts, the
8 advocacy, that those advocacy skills may, at the end of the
9 day, be better addressed in the forum that it should have been
10 addressed initially, and that is in the halls of the
11 Legislature. If that process not work its way and we are still
12 left where we are this morning, we will resume with the trial
13 either tomorrow morning or the week of March the 12th or
14 March 19th.

15 One final thought. On the matter of Mr. Troupis'
16 testimony, the court has no interest in engaging in what might
17 be best described as a discovery deposition in open court. As
18 a consequence, depending if it becomes necessary that the court
19 have to rule, and if it becomes necessary that Mr. Troupis
20 actually has to appear and testify, he will first be subject to
21 a discovery deposition outside of a formal court proceeding,
22 and that testimony may be distilled to a stipulation or
23 narrowly focused, but I and my colleagues have no interest in
24 presiding over what would be best described as a discovery
25 deposition. So to that extent, if there is testimony to be

1 taken, it will be taken first in discovery, and then to the
2 extent relevant and appropriate will come forward in the
3 context of a trial, if that becomes necessary.

4 So I will leave it to counsel to address each of
5 these matters and the concerns that the court has spread on the
6 record. We make no findings with respect to any of these
7 matters except I think to provide counsel with a little bit of
8 guidance as to what is on the court's mind. Anyone wish to
9 raise anything either procedurally or otherwise?

10 MR. DAUGHERTY: Nothing, Your Honor.

11 MS. LAZAR: No, Your Honor.

12 MR. SHRINER: If I may, Your Honor.

13 JUDGE STADTMUELLER: Go ahead.

14 MR. SHRINER: I'm glad we didn't make the top two
15 list of the court's issues of concern. I don't think there's
16 much of dispute, if anything, on Act 44, congressional
17 redistricting. It has nothing to do with disenfranchisement;
18 it has nothing to do with Voting Rights Act concerns. There is
19 no Voting Rights Act claim. It's a pure political
20 gerrymandering claim. It has been the subject of a long
21 briefed, fully briefed and submitted motion. I don't think
22 either side is going to offer much additional at trial, we
23 stipulated to a lot of facts, and while we are here to do what
24 the court wants and we will do what we are told to do, and we
25 will come back tomorrow and we will come back next month, if

1 that's what the court wishes, I would sure like to get this
2 part of the show off the bandwagon of Act 43, because I think
3 it's an entirely different case presenting entirely different
4 issues. I will be prepared to argue that today, tomorrow,
5 whatever you want to do it, if that's what you want, but I
6 think it would be useful and maybe useful to the court and
7 useful to the other parties if that part of the case could be
8 dealt with and disposed of. I don't have a suggestion beyond
9 that.

10 JUDGE STADTMUELLER: Certainly. Well, without
11 getting into the meat of Act 44, there is one very small issue,
12 and I appreciate that it's an issue that the court at some
13 point is going to have to grapple with, and that's this whole
14 genre of the impact of computerization with respect to
15 districting. With respect to Act 44, to the extent that
16 there's a little bit of a conflict, it really relates to the
17 matter of whether or not, unnecessarily so, forgetting the
18 whole gerrymandering argument, whether unnecessarily so,
19 without the implications of gerrymandering, a number of voters
20 were moved from one congressional district to another without
21 any meaningful explanation.

22 Obviously, if you talk to the experts, and we have
23 reviewed these expert reports that are already on file in part
24 of the public record in this case, there's an enormous amount
25 of activity that is available in terms of grappling with these

1 issues and modeling such that at the end of the day perhaps the
2 number of congressional voters would not have necessarily had
3 to have been moved. I make no bones about the fact that with
4 the advent of computers, it's very much like DNA. Why should
5 we not draw upon this wonderful technology just like the
6 criminal law enforcement field drawing upon DNA. It's
7 available. I appreciate that no court has said you have got to
8 do this or you have got to use this program, but in the
9 fundamental interest of fairness, isn't that what this is all
10 about?

11 To be sure, the public at large is probably more
12 frustrated than the members of the Legislature or the lawyers
13 or perhaps even the judges in terms of how this process
14 continues to unfold. Just when we are ready to go forward,
15 there's another fly in the ointment that needs to be addressed,
16 and that's what we are here for, we have no problem with that,
17 but getting up to speed just with the filings that have come
18 forward in the last 10 days is certainly a significant
19 challenge to any court, keeping in mind that this is not the
20 only case that Judge Stadtmueller and Judge Dow and Judge Wood
21 have on their calendars, just like for all of you this is not
22 the only case that you are working on. But at the end of the
23 day, my goodness, with all of the talent that is here today, I
24 think it is wise to simply suggest that it could be more wisely
25 used and more effectively used in the halls where it should be

1 used, and that is in the Legislature.

2 MR. SHRINER: Your Honor, my point is simply, and I
3 appreciate what the court said, in our view this doesn't
4 present any kind of a constitutional issue. As the court has
5 said this morning earlier, and I think it's the law, these are
6 decisions for the Legislature to make, and unless there's a
7 constitutional violation, there's nothing for this court to do.
8 My point is simply I don't think you are going to learn any
9 more from this trial about the facts. The facts are in the
10 record. We don't even think that the complaint presents a case
11 that needed to be met with facts. I'm just suggesting that we
12 can fairly easily pare that part of the case out from the rest
13 of it, it doesn't implicate any of the issues that the court
14 has expressed concern about, and I'm just offering our
15 availability as the court wishes to deal with that separately
16 and perhaps get that taken care of.

17 JUDGE STADTMUELLER: All right. Well, we will
18 certainly do that. I appreciate, for one, having sat on the
19 earlier case, that insofar as the congressional redistricting
20 is concerned, that generally it has been very much a bipartisan
21 effort by both David Obey and Jim Sensenbrenner and their
22 respective caucuses, but there's been a suggestion that while
23 there was certainly an awful lot of dialogue between the
24 caucuses and not a lot of objections, if we are talking about,
25 you know, what is appropriate. I'm not suggesting that it is

1 in any way controlling, but it certainly is a question. I will
2 leave it at that.

3 JUDGE WOOD: If I might just add, I think that in a
4 sense what we are saying is although it may well prove to be
5 the case, once we have finished these processes, that the facts
6 are sufficiently distinct, that Act 44 can be handled
7 differently from Act 43, our sense is we're not quite there
8 yet, but we are certainly aware of your point and will be
9 continuing to think about it.

10 MR. SHRINER: Thank you, Your Honor.

11 JUDGE STADTMUELLER: Anyone else have anything they'd
12 like to raise for the good of the order?

13 MR. POLAND: Not from the Baldus plaintiffs, Your
14 Honor.

15 MR. EARLE: Nor from the Voces de la Frontera
16 plaintiffs, Your Honor.

17 MR. KELLY: Not from the defendants, Your Honor.

18 JUDGE STADTMUELLER: All right. So we will, A, be
19 looking forward to a Memorandum with regard to Mr. Troupis, the
20 response tomorrow morning. In the meantime, something by the
21 end of the day as to whether there's any potential for this
22 case being revisited by the Legislature against the backdrop of
23 the comments that have been made of record. The court stands
24 in recess.

25 THE BAILIFF: All rise.

(Court adjourned at 9:24 a.m.)

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I, KATHY A. HALMA, Official Court Reporter
for the United States District Court, Eastern District of
Wisconsin, do hereby certify that I reported the foregoing
proceedings and that the same is true and correct in accordance
with my original shorthand notes taken at said time and place.

Case 2:11-cv-00562-JPS-DPW-RMD Filed 02/23/12 Page 20 of 20 Document 189